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No. 87-1910

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

TRUDIE P. WESTMORELAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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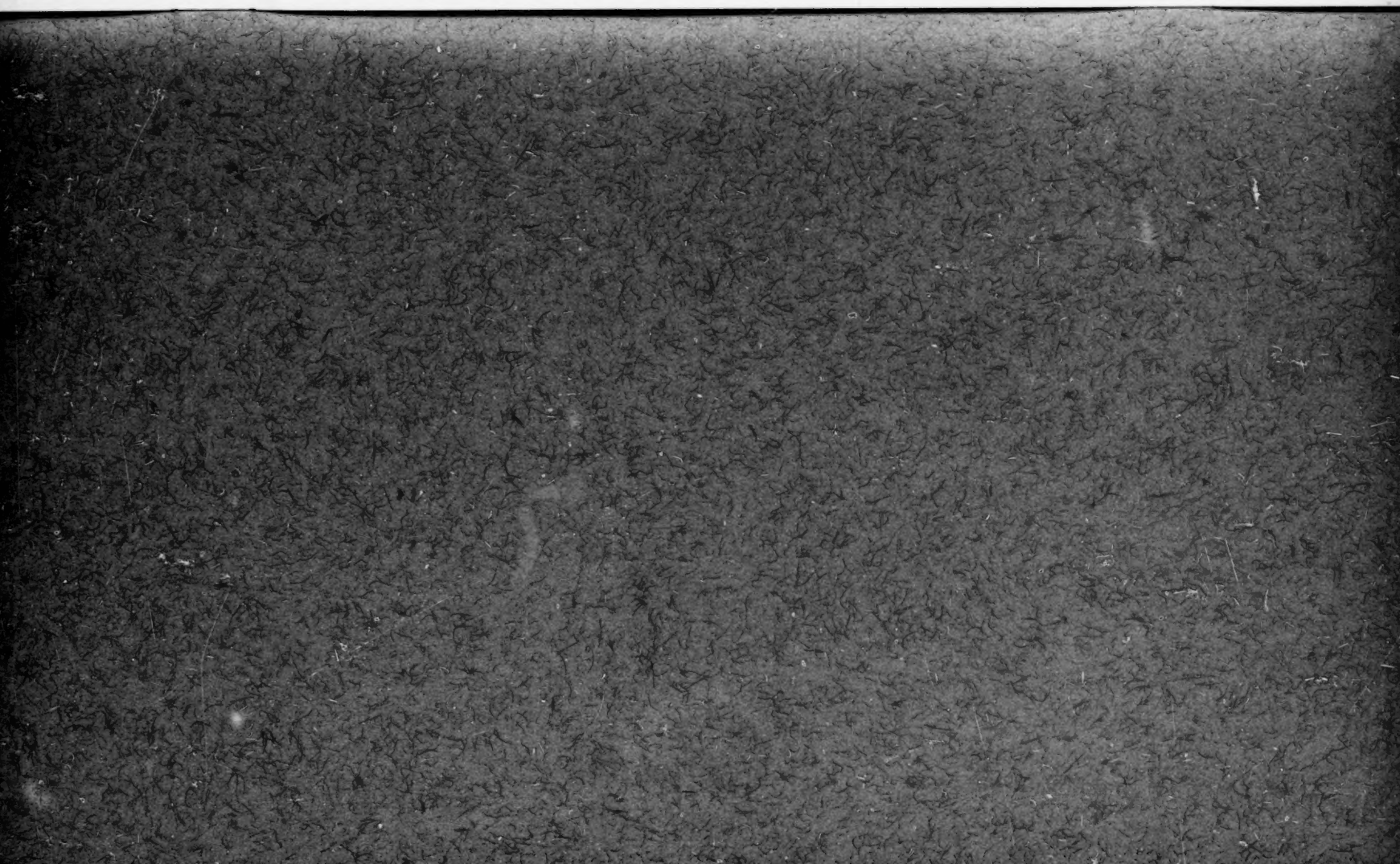

QUESTIONS PRESENTED

1. Whether 18 U.S.C. (Supp. II) 666(b), relating to bribery in connection with federally assisted programs, required that the government prove (1) that the specific transactions in connection with which the bribery occurred were funded by the federal government, and (2) that the defendant received a bribe of at least $5,000.

2. Whether the district court properly admitted evidence of prior misconduct by petitioner.

3. Whether the district court properly admitted evidence regarding another person's receipt of bribes.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 841 F.2d 572.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1988. The petition for a writ of certiorari was filed on May 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted on one count of improperly accepting money in connection with transactions involving a beneficiary of federal funds, in violation of 18 U.S.C. (Supp. II) 666(b),

three counts of mail fraud, in violation of 18 U.S.C. 1341, and two counts of extortion, in violation of 18 U.S.C. 1951. She was sentenced to nine years' imprisonment and a $10,000 fine on one of the extortion counts. Imposition of sentence on the remaining counts was suspended in favor of five years' probation. Petitioner was also ordered to pay restitution to the United States government of $1,702.

1. Petitioner was a county supervisor in Perry County, Mississippi. She had the authority to purchase materials for the county for road and bridge maintenance in her district. In 1986 she accepted a total of $1,702 from FBI undercover agent Jerry King, who was posing as a salesman for Mid-State Pipe and Supply Company. The payments were made in connection with the county's purchase of supplies from King's company. In addition, the evidence showed that petitioner accepted a total of $500 in kickbacks from Ray Davis in connection with county purchases of chemical supplies from him. Pet. App. A2. During the one-year period in which the payments were received, Perry County received federal revenue-sharing funds totaling $222,949.00, and it allocated $36,391.55 of those funds to petitioner's district. *Id.* at A5. Petitioner authorized, and the county paid, a total of $14,482.92 for the goods purchased in the transactions with which the kickback payments were associated. *Ibid.*

Petitioner's defense at trial was that she was not predisposed to commit the offenses but that she had been entrapped by Agent King. Pet. App. A14-A15. During trial, the district court admitted, over petitioner's objection, testimony by Agent King that before he initiated contact with petitioner, he had a conversation with another county supervisor, Junie Mixon, in which Mixon indicated that petitioner might be willing to accept kickbacks. Davis and King also testified about Mixon's receipt of payments;

Davis's testimony was given in the course of his explanation that he made an indirect offer to pay a bribe to petitioner by making reference to Mixon's receipt of payments. *Id.* at A13. The district court also admitted evidence on rebuttal that petitioner had been investigated for keeping fees she had received while serving as a local justice court judge, even though those fees properly belonged to the county. *Id.* at A10-A12.

2. The court of appeals affirmed (Pet. App. A1-A18). It rejected petitioner's contention that 18 U.S.C. (Supp. II) 666(b) required the government to show that federal funds had been involved in the tainted transactions. The court held that the statutory language was plain and unambiguous in providing that, if an agency received more than $10,000 a year in federal funds, the agency's employees were covered by the statute. The court found that there was nothing in the statutory language or the legislative history to suggest that the tainted transactions themselves must have involved federal funds. Pet. App. A6-A9. To the contrary, the court found that the legislative history of Section 666 indicated that Congress intended the statute to eliminate the need, found by some courts under prior law, to trace federal funds to the transactions that were affected by the employee's misconduct. Pet. App. A9.

The court of appeals also rejected petitioner's challenges to the admission of certain evidence. It found that the evidence as to Junie Mixon was relevant to the issue whether petitioner was entrapped and to counter petitioner's claim that because she was a new supervisor she did not realize that she was being offered illegal payments. Pet. App. A13-A14. The court noted that the evidence regarding Mixon was a small part of the overall evidence at trial and that the jury had been instructed that it should

return a verdict only on the offenses charged and should not consider the conduct of other persons. The court further found that the evidence against petitioner was overwhelming and that it was highly unlikely that the jury convicted petitioner on the basis of the evidence relating to Mixon. *Id.* at A14-A15. The court also held that the evidence regarding petitioner's embezzlement of county funds during the time she served as a justice court judge was properly admitted under Fed. R. Evid. 404(b). The court noted that the district court had weighed the probative value of that evidence against its possible prejudicial impact, that petitioner had an ample opportunity to challenge the evidence, and that, even in light of petitioner's explanation of discrepancies in her financial records as a justice court judge, the record was clear that some discrepancies remained. Pet. App. A11-A13.

ARGUMENT

1. Petitioner contends (Pet. 9-14) that 18 U.S.C. (Supp. II) 666(b) was not intended to cover the situation in which, although the governmental entity received more than $10,000 per year in federal assistance, the defendant received less than $5,000 in bribes, and no federal funds were involved in the particular transactions tainted by the bribes.

Petitioner's proposed construction of Section 666(b) is flatly at odds with the plain language of the statute. As the court of appeals stated,[1] the version of Section 666 that was in effect at the time of petitioner's offenses applied to the improper acceptance of payments in any amount if the government agency for which the defendant worked re-

[1] The Fifth Circuit is the only court to address the issue. In addition to the instant case, it has issued a second decision on the same point. See *United States* v. *Duvall*, No. 87-4663 (May 24, 1988).

ceived more than $10,000 per year pursuant to a federal program and the transaction or series of transactions tainted by the acceptance of improper payments involved $5,000 or more.[2] Section 666(b) applied to "an agent of an organization, or of a State or local government agency, described in subsection (a)," namely, an organization or agency "that receives benefits in excess of $10,000 in any one year period pursuant to a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance." 18 U.S.C. (Supp. II) 666(a). Section 666(b) made it a felony for such a person to accept or agree to accept "anything of value from a person or organization other than his employer or principal for or because of the recipient's conduct in any transaction or matter or a series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency."

On its face, the statute barred the receipt of "anything of value" by the agent; the $5,000 requirement applied to the value of the transaction or series of transactions tainted by the agent's misconduct, not to the amount received by the agent. Petitioner's effort to characterize the $5,000 requirement as a requirement that the particular transaction affected by the bribe be funded by federal money, or that the defendant receive a bribe of at least $5,000, finds no support whatever in the statutory language.

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[2] Section 666 was substantially amended in 1986 (Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 59(a), 100 Stat. 3612), although the amendment did not significantly alter the definition of the crime of which petitioner was convicted in this case.

Nor is the legislative history helpful to petitioner. Section 666 created a theft and bribery statute generally applicable to employees of organizations or government agencies that receive federal assistance. It was originally enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 1104, 98 Stat. 2143. Before the enactment of Section 666, courts had held that theft from an organization or government agency receiving federal assistance was subject to federal prosecution under 18 U.S.C. 641 only if it could be shown that the funds stolen were federal government property. It was difficult to satisfy that proof requirement, since federal funds were often commingled with other funds of the recipient agency. See S. Rep. 98-225, 98th Cong., 1st Sess. 370 (1983). Similarly, it was often difficult to prosecute an employee of an entity receiving federal funds under the federal bribery statute, 18 U.S.C. 201, because the courts of appeals were in disagreement about whether employees of such entities were public officials within the meaning of the statute. S. Rep. 98-225, *supra,* at 370.[3] As the Senate Committee explained, the weaknesses in federal law made it difficult to bring federal prosecutions for theft and bribery by employees of organizations or government agencies that received federal assistance, and the State and local governments were reluctant to prosecute such cases,

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[3] After the Senate report was filed, this Court held that the administrators of entities charged with the administration of federal grants are "public officials" within the meaning of the federal bribery statute, 18 U.S.C. 201(a). *Dixson* v. *United States,* 465 U.S. 482 (1984). The Court stated, however, that the mere presence of some public assistance does not bring an agency and its employees within the reach of the statute; in order for a person to be within the reach of Section 201(a), that person must have some degree of responsibility for carrying out a federal program. 465 U.S. at 499-500.

because they viewed the federal government as the principal victim. The Committee stated that it intended that the reference to federal programs be construed broadly, "consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." *Ibid.*

Petitioner is plainly wrong in arguing (Pet. 11-12) that the legislative history supports the proposition that Section 666(b) provided federal jurisdiction over bribery only if the amount of the bribe was more than $5,000. The legislative history on which petitioner relies relates to subsection (a) of the statute, not subsection (b). Subsection (a) provided federal jurisdiction over theft only if the amount of the theft was more than $5,000, and the legislative history that petitioner cites simply confirms that statutory requirement. Nothing in the legislative history suggests that the same $5,000 requirement applied to the amount of a bribe that otherwise fell within subsection (b). Subsection (b) contained entirely different language than subsection (a); it referred to the receipt of "anything of value" in connection with a transaction or series of transactions involving $5,000, while subsection (a) related to thefts of $5,000 or more from the organization or government agency. Thus, under either subsection, the offense had to affect transactions valued at $5,000 or more, but the nature of the effect was different. For the offense of theft under subsection (a), the effect had to be direct, in that $5,000 in funds had to be stolen from the organization or agency. Under subsection (b), by contrast, the effect could be indirect, in that the bribery offense merely had to be shown to affect transactions valued at $5,000 or more.[4]

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[4] Petitioner's contentions (Pet. 13-14) that Section 666(b) was unconstitutionally vague or that the rule of lenity requires that the Court

2. Petitioner also claims (Pet. 14-17) that the district court improperly admitted evidence of acts of misconduct by petitioner when she was serving as a local judge, prior to her service as a county supervisor.

Under Fed. R. Evid. 404(b), evidence of other acts of the defendant may not be admitted to prove character, but may be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Even if relevant under that Rule, "similar act" evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice" (Fed. R. Evid. 403).

The district court properly found that the evidence of petitioner's embezzlement of county funds was relevant to an issue other than petitioner's character, and that the probative value of that evidence outweighed the risk of unfair prejudice (Pet. App. A45-A47). The evidence consisted of testimony by a state auditor that petitioner had failed to account for $9,500 in fees that she had collected as a local judge. It was offered to rebut petitioner's defense of entrapment (see Tr. 479-556), by showing that she was predisposed to use her public office to take money unlawfully. The district court admitted the evidence on that basis and cautioned the jury that the evidence was to be used only in determining petitioner's state of mind in committing the charged offenses (Pet. App. A50-A51). Furthermore, as the court of appeals noted (*id.* at A12-A13), petitioner had an ample opportunity to rebut the evidence, and the fact that the audit that formed the

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interpret the statute in the fashion she suggests are totally without merit. As we have noted, the statute by its terms was quite precise. There is no vagueness about the jurisdictional amounts set forth in the statute, and in the absence of any ambiguity in the statutory requirements, the rule of lenity has no role to play.

basis for the state auditor's testimony was not yet complete did not render the evidence unreliable. While the auditor admitted that petitioner might be able to explain some of the discrepancies in the financial records, the auditor testified that a completed audit would nevertheless show that a discrepancy did exist.

Petitioner's reliance on *United States* v. *Biswell*, 700 F.2d 1310 (10th Cir. 1983), is misplaced. In that case, a food stamp fraud prosecution, the government elicited testimony from police officers that they were aware of past illegal activities by the defendant and that they had ongoing investigations regarding his conduct. The court of appeals found that the evidence was improperly admitted because the government did not identify the purpose for which it was offered, it did not identify a reasonably recent offense or conviction, and it offered only generalized information that the defendant was suspected of engaging in various types of criminal activity. The court therefore concluded that the evidence was of questionable reliability and that it reflected on the defendant's character rather than proving some fact relevant to the case. In this case, by contrast, the "similar act" evidence was very specific, the government offered it for a particular purpose permissible under Fed. R. Evid. 404(b), the evidence related to relatively recent conduct, and petitioner had an opportunity to rebut the evidence by challenging the accuracy of the audit. The district court therefore did not abuse its discretion by admitting the evidence.

3. Petitioner also contends (Pet. 18-21) that the district court erred by admitting testimony by Agent King that another supervisor, Junie Mixon, had told him that petitioner might be willing to accept kickbacks, and by admitting testimony by King and Ray Davis that they had paid kickbacks to Mixon.

The court of appeals correctly found that the admission of that evidence was not reversible error. Agent King's testimony was relevant to petitioner's claim that she was not predisposed to accept kickbacks. Petitioner made that contention throughout the trial, beginning with defense counsel's statement in opening argument that the jurors were "going to get a chance to see what the agent said, and I think you are going to find out that the agent had no knowledge whatsoever that [petitioner] was predisposed to do a wrong" (Tr. 23). The evidence that the FBI investigated petitioner only after learning from another corrupt county supervisor that petitioner might be willing to accept kickbacks directly countered petitioner's suggestion that the agents approached petitioner without any reason to believe she might be corrupt.

Davis's testimony about making payments to Mixon was also relevant. Davis testified that he had referred to the payments he made to Mixon as a way of indirectly inquiring whether petitioner would be receptive to a bribe. Davis's reference to the Mixon payments was therefore relevant because it provided an explanation of the circumstances under which petitioner agreed to accept unlawful payments from Davis.

Even if the admission of the evidence regarding the Mixon payments was erroneous, the error would not require reversal of petitioner's convictions. As the court of appeals noted, evidence regarding the payments to Junie Mixon was not extensive, and the evidence against petitioner was substantial (Pet. App. A14). The main issue at trial was whether petitioner had the requisite intent to commit the offense. She acknowledged receiving the payments from King and Davis, and the conversations with King during which petitioner accepted bribes and discussed the kickback schemes were recorded and played

for the jury. *Ibid.* As the court of appeals observed, "Even without considering evidence that she discussed taking kickbacks before the government became involved, surely the properly admitted evidence that she had previously used her public office for personal gain and that she dealt illegally with a vendor who was not a government agent shows that the government detected, rather than caused, her corruption" (*id.* at A15).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1988

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